



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 29 OF 2016**

**IN THE MATTER OF THE ESTATE OF MALAKWEN TARUS**

**Alias MALAKWEN KIMUKUNG TARUS (DECEASED)**

**IN THE MATTER OF AN APPLICATION FOR PRESERVATION OF THE ESTATE OF THE DECEASED**

**BETWEEN**

**BENJAMIN TARUS.....1<sup>ST</sup> EXECUTOR/APPLICANT**

**NOAH KIBET KIRWA.....2<sup>ND</sup> EXECUTOR/APPLICANT**

**AND**

**LYDIA CHEPKWONY.....1<sup>ST</sup> RESPONDENT**

**WESLEY KIPLAGAT.....2<sup>ND</sup> RESPONDENT**

**LEAH CHEROTICH.....3<sup>RD</sup> RESPONDENT**

**RULING**

[1] The two applicants are the executors of the Will of the deceased, **Malakwen Tarus alias Malakwen Kimukung Tarus**. They applied for probate herein on **17 May 2016** and were issued with Grant of Probate on **29 March 2017**. Shortly thereafter, on **11 April 2017**, an application for revocation of Grant was filed herein by **Philip Chepkwony** through the law firm of **M/s Mandere Nyandoro & Company Advocates**. That application was still pending hearing and determination when the instant application, dated **15 June 2020**, was filed by the two Executors against **Lydia Chepkwony, Wesley Kiplagat** and **Leah Cherotich**.

[2] In the Supporting Affidavit sworn by **Benjamin Tarus**, the 1<sup>st</sup> applicant, it was explained that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the widow and son of **Philip Chepkwony**, the applicant in the revocation application; and that he died on **21 September 2019**. It was further disclosed by the 1<sup>st</sup> applicant that the parties are protagonists in **Eldoret ELC No. 82 of 2016**, in which the subject matter is the estate property; and that, after the demise of **Philip Chepkwony**, the respondents have been interfering with the quiet occupation by the deceased's beneficiaries of some 48 acres forming part of the estate property. Accordingly, the Executors filed the Summons dated **15 June 2020**, seeking the following orders:

[a] That **Lydia Chepkwony, Wesley Kiplagat** and **Leah Cherotich**, their employees, agents, assigns and anybody acting for or through them be restrained from leasing and wasting or in any other way interfering with the 48 acres forming part of **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON) 2** measuring approximately 78.31 Ha (193.4 acres) pending the hearing and determination of the application.

[b] That the Court do restrain **Lydia Chepkwony, Wesley Kiplagat** and **Leah Cherotich** from preventing **Benjamin Tarus, Isaac Chepkwony, Dorcas Jemeli** and **Sarah Tarus**, the beneficiaries of the deceased, from ploughing their portion of 48 acres which they are in occupation of, pending the hearing and determination of this cause.

[c] That the Court be pleased to restrain the Officer in Charge of **Chukura Police Post** and the area chief, **Barnabas K. Tireito**, from interfering with the quiet occupation and possession by **Benjamin Tarus, Isaac Chepkwony, Dorcas Jemeli** and **Sarah**

Tarus of the property known as **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON) 2**.

[d] That the County Surveyor be ordered to survey the acreage of the beneficiaries' portions vis-à-vis the respondents' and file a report in court.

[e] That the Court be pleased to make a finding that **Lydia Chepkwony, Wesley Kiplagat and Leah Cherotich** have committed an offence under **Section 45** of the **Law of Succession Act** and therefore are liable for punishment.

[f] That the Court be pleased to commit **Lydia Chepkwony, Wesley Kiplagat and Leah Cherotich** to prison for a period not exceeding one year or to pay a fine not exceeding **Kshs. 10,000/=** or both such fine and imprisonment for intermeddling with the property of a deceased person.

[g] That the Officer in Charge of Chukura Police Post and the office of the chief, Matunda Location, to ensure compliance.

[h] That the Court be pleased to make any other or further orders as the ends of justice may require.

[i] That the costs of the application be in the cause.

[3] The application is expressed to have been brought under **Article 48** of the **Constitution of Kenya, Section 45 and 47** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya and Rules 59(1), 61(1) and 73** of the **Probate and Administration Rules, 1980**. It was also supported by the affidavits of **Isaac Chepkwony** and **Sarah Tarus** and the documents annexed thereto.

[4] In response to the application, the respondents relied on the Replying Affidavit sworn on **23 June 2020** by **Leah Jerotich**, the 3<sup>rd</sup> respondent herein. She averred that she is one of the daughters of the deceased and confirmed that the 1<sup>st</sup> respondent is the widow of her deceased brother, **Philip Chepkwony**, while the 2<sup>nd</sup> respondent is the son of **Philip Chepkwony**. She further confirmed that **Philip Chepkwony** filed **Eldoret ELC No. 82 of 2016** against the applicants and 3 others; and that a temporary injunction was issued in that matter at the instance of the deceased, **Philip Chepkwony**, for the purpose of preserving the estate pending determination of the suit.

[5] It was therefore the averment of the 3<sup>rd</sup> respondent that, if anything, it was the applicants who blatantly disobeyed the injunction issued in **Eldoret ELC No. 82 of 2016** by ploughing the disputed portion of the suit property in disregard of the court order; and that it was in a bid to enforce the said order that the area chief and the Officer in Charge of **Ziwa Police Station** visited the disputed property. The 3<sup>rd</sup> respondent annexed several documents to her affidavit to buttress her averments; which documents include a copy of the Order issued in **Eldoret ELC No. 82 of 2016** issued on **11 March 2020**.

[6] The applicants felt constrained to refute the 3<sup>rd</sup> respondent's assertions. Accordingly, a Supplementary Affidavit was filed on their behalf, sworn by the 1<sup>st</sup> applicant on **2 July 2020**. He deposed that the temporary injunction issued on **5 April 2017** automatically lapsed after one year of the date of issue as stipulated by **Order 40 Rule 6** of the **Civil Procedure Rules**. He reiterated his assertion that there is need for a survey to be conducted on the suit property to demarcate the beneficiaries' respective portions pending the determination of this cause.

[7] Pursuant to the directions given herein on **24 June 2020**, the application was canvassed by written submissions; to which end, the applicants filed their written submissions **7 July 2020**, proposing the following issues for determination:

[a] Whether or not the Court should grant an injunction against the respondents;

[b] Whether or not the orders issued on **5 April 2017** have lapsed under **Order 40 Rule 6** of the **Civil Procedure Rules**;

[c] Whether or not the respondents are valid objectors **under the Law of Succession**;

[d] Whether or not the respondents' acts amount to intermeddling under **Section 45** of the **Law of Succession Act**;

[e] Whether the County Surveyor should be compelled to survey the acreage of the beneficiaries and the respondents and file a report in court.

[8] On whether the Court should grant an injunction against the respondents, **Ms. Chelashaw**, counsel for the applicants relied on **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 3 and **R.J.R. Macdonald vs. Canada (Attorney General)** in urging the Court to find that the three conditions set therein for the grant of an injunction have been established herein. In particular, counsel submitted that the applicants have shown that they are the duly appointed executors of the deceased's Will and therefore vested with the power to control and administer the estate of the deceased, including the disputed 48 acres. She further submitted that the applicants have administered the estate dutifully and distributed it among the beneficiaries as directed by the deceased; and that the respondents are unlawfully interfering with the beneficiaries' peaceful possession on the suit land without any legal basis. Thus, according to counsel, a prima facie case has been established by the applicants with a probability of success.

[9] On whether the applicants are likely to suffer irreparable harm which cannot be adequately compensated by an award of damages, counsel relied on **Nguruman Ltd vs. Jan Bonde Nielsen & 2 Others** [2014] eKLR as to what amounts to irreparable injury. She urged the Court to find that the respondents, along with the area chief, **Barnabas K. Tireito**, and the Officer in Charge of Chukura Police Station have not only interfered with the beneficiaries' quiet possession and prevented them from ploughing or cultivating the land; but have also leased portions thereof to the area chief. Hence it was the submission of counsel that, unless restrained, the beneficiaries and the estate shall suffer irreparable harm which cannot be adequately compensated by damages.

[10] On the authority of Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 Others [2016] eKLR, Ms. Chelashaw submitted that the beneficiaries of the deceased have been in occupation of the 48 acres since 1963; and therefore that the balance of convenience is in favour of maintaining that status quo pending the hearing and determination of this succession cause by having the respondents restrained as sought. She also submitted that sufficient cause has been shown for the Court to issue restraining orders against the area chief, **Barnabas K. Tireito** and the Officer in Charge of Chukura Police Station from interfering with the beneficiaries' quiet occupation and possession of the suit property.

[11] It was further the submission of counsel for the applicants that since the temporary injunction issued on 5 April 2017 in **Eldoret ELC No. 82 of 2016** had automatically lapsed after one year by dint of **Order 40 Rule 6** of the **Civil Procedure Rules**, there was no valid order for enforcement by the area chief and the Officer in Charge of Chukura Police Station. Thus, the Court was urged to find that there was no legal basis for the interference by the respondents in the beneficiaries' quiet and peaceful occupation of the disputed 48 acres.

[12] Counsel for the respondents also cited **Order 24 Rule 3** of the **Civil Procedure Rules** to buttress her argument that since the substitution of **Philip Chepkwony** (now deceased) was yet to be formally undertaken both in this cause and in **Eldoret ELC No. 82 of 2016**, the respondents have no *locus standi* to address the Court. She accordingly urged the Court to find that, by leasing out the suit property to the area chief and the Officer in Charge of Chukura Police Station, the respondents have committed the offence of intermeddling for purposes of **Section 45** of the **Law of Succession Act** for which they ought to be accordingly penalized.

[13] Lastly, Ms. Chelashaw submitted that since the dispute between the parties is essentially a boundary dispute, there is justification for a court-mandated survey by the County Surveyor; and for the chief Matunda Location and the Officer in Charge of Chukura Police Post to be required to ensure compliance with such orders as the Court may be pleased to make.

[14] On behalf of the respondents, **Mr. Mathai** relied on his written submissions filed herein on 24 July 2020. On his part, he proposed the following 4 issues for determination:

- [a] Whether the Court can grant the orders of injunction in the circumstances;
- [b] Whether there is evidence of intermeddling;
- [c] Whether the respondents ought to be punished for intermeddling; and,
- [d] Whether an order for the County Surveyor to undertake a survey of the disputed portion of the land is warranted.

[15] Counsel for the respondents also relied on Giella vs. Cassman Brown & Co. Ltd [1973] EA 358 as well as Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR and Central Bank of Kenya & Another vs. Uhuru Highway Development Ltd & 4 Others for an explication of the conditions of granting a temporary injunction and what amounts to a *prima facie* case; but posited that the applicants had failed to satisfy those prerequisites. He submitted that the applicants had failed to prove that the respondents had leased out 48 acres of the estate as alleged in the 1<sup>st</sup> respondent's affidavit; or that they were evicted from their respective portions of the estate property and thereby restrained from using the property.

[16] With regard to the allegations that the respondents were using the area chief, **Barnabas K. Tireito**, to evict the beneficiaries of the deceased, counsel reiterated the averments of the respondents that the said chief was only executing a court order issued in **Eldoret ELC No. 82 of 2016** which the applicants had breached. Counsel for the respondents accordingly urged the Court to find that, for failing to make a full and frank disclosure, including a disclosure of the existence of the injunctive orders issued against them in **Eldoret ELC No. 82 of 2016**, the applicants are not entitled to the orders sought. He relied on Brinks Mat Ltd vs. Elcombe [1988] 3 AllER 188 to back up his arguments.

[17] As to whether there is evidence of intermeddling, **Mr. Mathai** submitted that it was imperative for the applicants to demonstrate that the respondents dealt with the disputed portion of the estate unlawfully and without authority. He added that, having failed to establish a *prima facie* case with probability of success, it cannot be said that intermeddling has been proved. In particular, it was the submission of counsel that no evidence was tendered by the applicants to suggest that the alleged acts of eviction and leasing of 48 acres of the property was done by the respondents. Thus, counsel was of the view that, in the circumstances, no justification for the punishment of the respondent for intermeddling had been made.

[18] In response to the applicants' prayer for a court-mandated survey, **Mr. Mathai** took the view that, since there is a dispute pending between the parties before the Eldoret E & L Court over the said property, it would only be proper that the issue of survey be dealt with by that court.

[19] Thus, having given careful consideration to the averments set out in the affidavits filed herein by the protagonists and perused the record, it is not in dispute that the deceased, **Malakwen Tarus**, died on 15 August 2014 leaving behind an estate comprising of the following two assets:

- [a] **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON)** 2 measuring 78.31 Ha.
- [b] **MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA)/444** measuring 87.09 acres

[20] The deceased had three wives and several sons and daughters, including the applicants and **Philip Chepkwony**, who is now deceased. There is no dispute that the 3<sup>rd</sup> respondent is a sister to **Philip Chepkwony** and therefore one of the daughters of the deceased; and that 1<sup>st</sup> respondent is the widow of **Philip Chepkwony**; while the 2<sup>nd</sup> respondent is the son of **Philip Chepkwony**. The annexures to the affidavits filed in respect of the instant application also confirm that there is a pending dispute before the Eldoret E&L Court over the property known

as **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON) 2**. That suit was filed by **Philip Chepkwony** (now deceased) against **Benjamin Tarus** (the 1<sup>st</sup> applicant herein), **Isaac Chepkwony**, **Dorcas Jemeli**, **Boaz Kosachtai** and **David Ngetich**; and it is worth noting that, according to the letter of the Chief, Ziwa Location, the applicants belong to the 1<sup>st</sup> House, while **Philip Chepkwony** and the 3<sup>rd</sup> respondent, and by extension the 1<sup>st</sup> and 2<sup>nd</sup> respondents, belong to the 2<sup>nd</sup> House.

[21] Having been named in the deceased's Will as the executors, the two applicants filed this cause for Grant of Probate on **17 May 2016**; and the Grant was issued on **29 March 2017**. **Philip Chepkwony** then moved to Court for revocation of Grant vide his application dated **11 April 2017** on the ground, *inter alia*, that some beneficiaries were left out of the deceased's Will.

[22] With the foregoing background in mind, the key issues for determination, in my view, are:

[a] Whether or not the respondents have intermeddled with the deceased's estate for purposes of **Section 45** of the **Law of Succession Act**;

[b] Whether or not the Court should grant an injunction against the respondents in the circumstances.

[23] **Section 45** of the **Law of Succession Act** is explicit that:

**“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”**

[24] Hence, the observations in Benson **Mutuma Muriungi vs. CEO Kenya Police Sacco & Another** [2016] eKLR are apt:

**“There is no specific definition of the term intermeddling provided for in the Law of Succession Act. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as: “for any purpose” and “or otherwise intermeddle with” in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as: taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act or any other written law. I do not pretend to close the list either or make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law.”**

[25] It is not the contention of the applicants that the respondents took possession of, or disposed of, transferred, exchanged, received the estate property or paid out funds from the estate without authority. Likewise, it is not the case that the respondents have distributed or made donations from the estate of the deceased. They have not charged or mortgaged the suit property or otherwise dealt with it in a manner contrary to the **Law of Succession Act** or any other law. The complaints levelled against the respondents by the applicants are that they leased out part of the disputed property and evicted the rightful beneficiaries thereto; and in particular the two applicants and their siblings, **Dorcas Jemeli** and **Sarah Tarus**. It is noteworthy however that, in the same breath, the 1<sup>st</sup> applicant conceded in paragraph 4 of his Supporting Affidavit that:

**“...the respondents are in occupation of 33 acres of land forming part of MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON) 2 measuring approximately 78.31 Ha (193.4 acres).**

[26] Indeed, according to the deceased's Will, **Philip Chepkwony** was provided for and given a sizable portion of **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON) 2**. The applicants conceded that survey is yet to be undertaken to determine the respective portions bequeathed to each of the beneficiaries of the deceased's Will. Moreover, it is not the contention of the applicants that the respondents disposed of any portion of the estate property, let alone the portion intended for the applicants. In those circumstances, there is absolutely no basis for holding that the respondents intermeddled with the property. As sons and daughters of the deceased, the applicants and the respondents are all entitled to a share of the deceased's estate and the applicants have no basis for claiming any superior rights of use that are enforceable for purposes of **Section 45** of the **Law of Succession Act**.

[27] Moreover, as late as **16 January 2019**, the Eldoret E&L Court affirmed the injunctive orders issued in favour of **Philip Chepkwony** in the following terms:

**“...the respondents are reminded that the orders are still in force and obedience of the same is mandatory. The dismissal of this application does not give the respondents a ticket of disobeying the orders...”**

[28] Accordingly, rather than proceed on the basis of the presumption that the injunction orders issued by the Eldoret E&L Court on **5 April 2017** lapsed on **4 April 2018**, the applicants ought to have moved the E&L Court for the expeditious disposal of the pending suit to pave way for the final distribution of the estate and the determination of the boundaries for each of the beneficiaries. In the same vein, I find misconceived the submission by counsel for the applicants that the respondents are not proper parties to the application; granted that they are yet to formally apply for substitution. As pointed out hereinabove, the 3<sup>rd</sup> respondent is one of the daughters of the deceased and has equal rights as the applicants. As for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their interest in the portion of the estate that was bequeathed to **Philip Chepkwony** cannot be wished away. In any case, it is the applicants who enjoined the respondents to the instant application. They have no

basis therefore arguing that the two have no *locus standi* in respect of the instant application.

**[29]** Having found that the applicants have failed to prove intermeddling, it would follow that no justification has been made for the issuance of the restraining orders sought by the applicants. In the result, the application fails and is accordingly dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 22<sup>ND</sup> DAY OF OCTOBER 2020**

**OLGA SEWE**

**JUDGE**